PUBLIC PROSECUTOR

v.

MOHD. SALLEH AWANG & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[CRIMINAL TRIAL NO. 10/1980 AND 14/1980]
1 MARCH 1982

CRIMINAL PROCEDURE: *Discharged Firearm with intent to cause death - Accomplices present at the scene of robbery - Whether reasonably presumed to have known that principal offender had under his control the firearm.*

CRIMINAL PROCEDURE: *Caution Statement - Whether accused must know the charge pending against him at the time the cautioned statement is recorded - Whether caution to be explained or to be administered - Same police officer recorded statements from all 3 accused - Effect - Voluntariness - No fear or promise or threat.*

The four accused were jointly tried under the Firearms (Increased Penalties) Act 1971. Accused 1; Mohd. Salleh bin Awang is the principal offender who was charged with four others, one of whom was still at large, whilst at the time on 19 July 1980 at about 2.10 p.m. of committing a scheduled offence to wit, robbery, discharged a firearm with intent to cause death an offence punishable under s. 3 of the Firearms (Increased Penalties) Act 1971. The charge against the other three accuseds was that they being accomplices of the said Mohd. Salleh bin Awang, who with intent to cause death discharged a firearm at the time of the commission of the scheduled offence of robbery were present at the scene of the commission of the said robbery who all three might reasonably be presumed to have known that the said Mohd. Salleh bin Awang had under his control the firearm and they have committed an offence punishable under s. 3A of the Firearms (Increased Penalties) Act 1971.

The evidence was that on 19 July 1980 at about 2.00 p.m. two New Zealand army families from Singapore were at a picnic ground at Tanjong Balau. They were Sgt. T.A.J. O'Neil (PW2), his wife and three children and the other Sgt. Yaxley (deceased) his wife, sister-in-law and two children. At the time they saw four men apparently washing their trousers in the sea. On seeing them, they retreated to their motorcars and on reaching their motorcars, the four men suddenly confronted them. Two of them were carrying guns, one a revolver and another a handgun, pointing at Sgt. Yaxley, Sgt. O'Neil and the group while the other two men accompanying the gunmen were carrying sticks in their hands. The two families kept themselves together in a group. When the man holding the handgun ordered them to kneel down, Sgt. Yaxley (deceased) repeatedly asked them what they wanted and suddenly a shot was fired by accused 1 Mohd. Salleh bin Awang hitting Sgt. Yaxley in his head and he fell down. The same accused then pointed the gun at Sgt. O'Neil who raised his hands and laid himself on the beach and others in the group were similarly ordered to lie down which they did.

At this stage, the same accused with the handgun asked for Sgt. O'Neil's wrist watch and car key and went to Sgt. Yaxley's (deceased) body and took a wrist watch from it. From the women, the accused took their wrist watches, handbags, and the car key and after that ordered the group not to follow them. The accused then left driving the motorcars of Sgt. O'Neil and Sgt. Yaxley which were later found abandoned, one at Kulai and the other at Air Benbam. Immediately after the accused left, Sgt. O'Neil arranged to send Sgt. Yaxley to the hospital but he died on the way to hospital. They later went to the Kota Tinggi police station.

Following investigations, accused 2; Ghazali @ Daud bin Deraman was arrested first on 19 July 1980 when he wanted to lodge a report at Pengkalan unit, Kawalan Kawasan (police base). Accuseds 3 and 4; Melan bin Ithnin and Mamat bin Salleh were arrested on the following day at Kg. Tok Siak. A wrist watch which was recovered from accused 4 was identified by Sgt. O'Neil as his.

Accused 1, Mohd. Salleh bin Awang was arrested almost a month later. He attempted a shootout with the inspector at the time of his arrest but as his revolver misfired twice, he was apprehended by the inspector. All the accused except for accused 2, Ghazali @ Daud bin Deraman were identified at a parade as the persons who took part in the alleged offence. The evidence against accused 2 was that by transporting all the four accuseds in his motorcar from Johore Bahru to Tanjong Balau the place of incident, he has taken part in the alleged crime. The prosecution also sought to produce cautioned statements recorded from accuseds 2, 3 and 4. After a trial within a trial was conducted to determine the admissibility of those statements the Court at the conclusion of the trial, ruled that all the cautioned statements were not made voluntarily and therefore not admissible. This ruling appears below.

Accused 1, the principal offender pleaded guilty to the charge and admitted the facts summarized to him as correct whereas the other 3 accused claimed trial to the charge and the trial proceeded in the presence of accused 1.

Held:

[1] The Court accepted accused 1's plea of guilty and convicted him. The law only prescribes one punishment for the offence he had committed, that is, the death penalty. The Court therefore pronounced the death sentence on him.

[2] Except for the evidence of his arrest, the evidence against accused 2 seems highly circumstantial. He was not present at the scene of the alleged crime which is an essential ingredient on a charge under s. 3A of the Firearms (Increased Penalties) Act 1971. The accused 2 is therefore acquitted and discharged without his defence being called.

[3] The Court called for the defence of accused 3 and 4 as it was satisfied that they were accomplices to the crime committed by accused 1. Their presence at the scene of the crime was proved beyond doubt. These gave rise to presumption in law that they had knowledge that the principal offender accused 1 had in his control the firearm used in the crime. It was then incumbent for both accused to rebut this presumption.

[4] The prosecution did not establish that both accused had prior knowledge of the firearm in accused 1's possession or control. It is the Court's view, and in all probability, that they had no such knowledge as imputed to them by law. The presumption in law was rebutted by both accused 3 & 4.

[5] It is the finding of the Court that both accused 3 and 4 have rebutted the presumption against them and they have also proved that they could not have taken any reasonable steps to prevent the discharge from the firearm in control of accused 1. In this event, both accused 3, 4 were therefore acquitted and discharged.

[Accused 1 convicted & sentenced to death. Accused 2 acquitted & discharged without defence being called. Accused 3 & 4 acquitted & discharged after defence was called]

Legislation referred to:

Criminal Procedure Code, s. 113

Firearms (Increased Penalties) Act 1971, ss. 3, 3A

For the accused 1 - Subra Naicker
For the accused 2 - R.K. Menon
For the accused 3 - S. Sagadeva
For the accused 4 - V.P. Nathan

JUDGMENT

Mohd. Yusoff Mohamed J:

I will now give my ruling on the recording of the cautioned statements. Firstly, it is submitted in Court by Mr. R.K. Menon that there must be consensus *ad idem* between the recording officer and the accused person, in the sense that the accused person must know what charge was pending against him at the time when the cautioned statement was recorded by the police officer. At that time he said, even the recording officer did not know what charge was preferred against the accused person. The law is clear in that under s. 113 CPC, cautioned statements can be recorded from the accused person either before or after the charge was preferred against the accused. That means that even if no charge was made, the police still can record the cautioned statement from him and that statement can be used against him on any charge later preferred.

I think your submission there has no merit. Secondly, you said the caution was not explained to the accused person, at the time or before the cautioned statement was recorded from him. But the law does not say that the caution must be explained, so long as the caution was administered to the person. It is a matter of prudence I think, if the accused person was for example, a rustic person like the padi planters or fishermen, it would then be necessary to do so. It appears that all the accused persons here, are not such rustic persons.

On the other hand, the Deputy Public Prosecutor contends that so long as the cautioned statement was signed, then the statement is authentic and that the statement was therefore given voluntarily by the accused. It is difficult for me to accept that proposition when in the present case, there are some other evidence alleging impropriety concerning the recording officer. If there is only the allegation that the accused was handcuffed at that time when he was asked to sign the statement due to security precaution, I would have accepted the statement as given voluntarily. But as we have here, there are other factors surrounding the recording of these statements. They are more fatal, I think. These factors are that the officer concerned recorded two statements from each of the accused persons. In respect of accused 2, the first statement was recorded on 20 July 1980 and the second statement was recorded from him on 4 August 1980. Similarly with accused 3, the first statement on the same day and the second statement was recorded on 10 August 1980 and in respect of accused 4, the first statement recorded was on 21 July and the second statement on 10 August. It is difficult to say, especially with regard to the second statement whether it was voluntarily given by the respective accused person. The fact that they had made the first statements earlier to the same officer they had no option to refuse making the second statement without jeopardising themselves and that cannot be contended that the second statement was made voluntarily by them. There were some elements of force. In these circumstances, all the second statements that have been recorded by the police cannot in my view, be accepted as having been voluntarily made.

Another crucial point is that, from the evidence it shows that the same police officer recorded all the statements from all the 3 accused persons. This indicates that the recording officer had all the facts in his mind after he had recorded the first statement from the 1st person, and he was very familiar with them. These statements were recorded in the form of questions

and answers. Though in law, this is acceptable, in practice it would be most difficult for these persons to deny the questions put to them because the officer concerned could confront him with other accused who had given their statements earlier as he desired. He could say "You either admit this or I have some other witnesses who would say so." What chance have they got to deny their involvement? How can we say in such circumstances the statements were made voluntarily?

Thirdly, we have the evidence also showing that the statement from accused 4 was taken at an early hour of the morning at 1.45 a.m. to be exact. Now if he desired to make the statement voluntarily, why should he make the statement at that hour past midnight. He could have waited until the next morning. The fact shows that the accused 4 was taken out from his cell possibly forcibly from his sleep and that for that reason it would be difficult to say that the statement came out from him on his own free will. In this respect I think there appeared to have been some abuse of powers by the officer recording the statements. You can take out witnesses for the purpose of interrogation for other purposes. But in the normal circumstances, when you say that the statement was given voluntarily by the accused person this interrogation method cannot be used without affecting his free will. This has happened to accused 4. There is strong indication that similar methods have been used by the officer against other accuseds. For these reasons it would not be safe to accept all the statements given by all the accused here, as voluntary.

The principle in accepting cautioned statement as admissible is that it was made voluntarily. This means that there was no fear or promise or threat handed out by any officer in authority on the person making the statement. If there was any suspicion of what had happened here was true, it was sufficient to exclude the statement. For these reasons, all the statements given at Exhibits 21, 22 and 23 in my view, cannot be accepted and I order that they be expunged from record.

Also found at [1982] CLJ 491